Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-957

MRS. WINSTON CALDWELL, Administratrix
and JAMES J. SHANLEY, *Petitioners*

v.

THE UNITED STATES, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE SUPREME COURT OF THE UNITED STATES

MRS. WINSTON CALDWELL, Administratrix and JAMES J. SHANLEY, ***Petitioners***

v.

THE UNITED STATES, ***Respondent***

No. _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The opinion of the Court of Claims is reported at 481 F2d 898; 202 Ct. Cl. 423.

JURISDICTION

The judgement was entered on June 20, 1973. Petitioners' motion for relief from judgement was denied on October 10, 1974. Petitioners' application for an extension of time to file a petition for a writ of certiorari was allowed on January 9, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1255.

QUESTION PRESENTED

Whether Court of Claims Rule 152(b) governing relief from judgement should be applied consistently with Rule 60(b) of the Federal Rules of Civil Procedure?

RULES INVOLVED

Court of Claims Rule 152(b) provides:

> **(b) Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.; Response; Reply:** On motion conforming to Rule 51 and upon such terms as are just, the court may relieve

> a party or his legal representative from a final judgement, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 151(c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ....

Rule 60(b) of the Federal Rules of Civil Procedure is is identical to the Court of Claims rule in all of its substantive terms.

STATEMENT

The trial below was concerned with the validity of petitioners' patent for a thermionic converter - an electrical generator which converts heat directly into electricity. The patented device consists of two electrodes which are insulated from each other and spaced 2/100 inch apart, with a vacuum in between.

At the trial of the case in September 1971 the Government placed in evidence documents authored by Dr. Langmuir and Dr. Champeix concerning "space charge" in electron tubes, which suggested that the electrodes of some tubes should be spaced as close together as possible in order to overcome space charge. The Government then presented as an expert witness, an employee of the Atomic Energy Commission who testified that the electrodes of a thermionic converter should also be spaced as close together as possible.

As a result of the Government testimony, the Court of Claims held the patent invalid over the Langmuir and Champeix references. The opinion states:

> "In view of such teachings, **it seems obvious that one would want to place the electrodes as close together as possible without actually touching.**" (481 F 2d 898, 904; 202 Ct. Cl. 423, 434)

In June 1974 petitioners filed a motion for Rule 152(b) relief to permit consideration of Atomic Energy

Commission Report No. TEE 41[illegible] May 1971). This report contains the results of 3[illegible] thermionic converters using varied electrode spacing. The tests reveal that very close electrode spacing caused the electrical voltage of the thermionic converters to drop as much as 73% below the voltage generated using 2/100 inch spacing. Contrary to the Government trial testimony, **the Government document discloses that it is *not* desirable to place the electrodes as close together as possible.**

In October 1974 the Court of Claims denied petitioners' 152(b) motion in a summary order which does not disclose the reason for refusing to consider the Atomic Energy Commission Report.

ARGUMENT

Under Rule 152(b) the Court of Claims judgement should be set aside because AEC Report No. 4125-5 reveals that the testimony of the AEC witness, upon which the judgement depends, was incorrect. It was untrue.

Furthermore, the AEC report, dated May 1971, was in the Government's hands four months prior to the start of the trial, but was not furnished to petitioners during pre-trial discovery. Instead, the Government withheld the report and presented misleading testimony to the trial court.

Court of Claims Rule 152(b) was adopted directly from Federal Civil Rule 60(b) in May 1951 (113 Court of Claims Reports, x-xi). In view of this origin, Rule 152(b) should be construed and applied consistently with Rule 60(b).

Under circumstances substantially parallel to those presented here, the United States Circuit Court of Appeals for the Fifth Circuit affirmed an order granting 60(b) relief:

> "Out of patentee's records, the Williamson June 23, 1959 affidavit was therefor proved to be incorrect. It was untrue. .... But we do not think it shows a deliberate evil purpose to misstate or conceal, or thereafter engage in foot-dragging lest the truth might be discovered.

> **But this does not alter granting 60(b) relief. ....** The effect was the same whether there was evil, innocent or careless purpose. **In either event it was the action of the party while the case was still 'alive' and when had the truth now revealed been known, quite a different result might have come about." (BROS INCORPORATED v W. E. GRACE MANUFACTURING COMPANY,** 351 F2d 208, at 211.)

The Fifth Circuit decision was cited and followed by the Third Circuit in reversing a district court refusal to allow 60(b) relief. The Third Circuit added:

> "It is true, as Webster argues, that relief under 60(b) is discretionary with the district court. But the action of the court is reviewable for abuse of discretion." **(ESTATE OF MURDOCH v COMMONWEALTH OF PENNSYLVANIA, et al.,** 432 F2d 867, at 870.)

In the light of the Third Circuit and Fifth Circuit decisions, the Court of Claims should have granted relief from judgement, and the order denying such relief is reviewable for abuse of discretion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be allowed.

Respectfully submitted,

FRENCH CALDWELL
Attorney for Petitioners

February 1975

IN THE UNITED STATES COURT OF CLAIMS

No. 326 - 70

MRS. WINSTON CALDWELL, ADMINISTRATRIX, AND JAMES J. SHANLEY

v.

THE UNITED STATES

Before COWEN, **Chief Judge**, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, **Judges.**

ORDER

This case comes before the court on plaintiffs' motion, filed June 13, 1974, for relief from judgment. Upon consideration thereof, together with the opposition thereto, without oral argument,

IT IS ORDERED that plaintiffs' said motion for relief from judgment be and the same is denied.

BY THE COURT

OCT 10 1974

/s/ Wilson Cowen
Chief Judge